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A Comparative Look at Anti-Stalking Legislation in the United States and Japan

By NGA B. TRAN*

Introduction

In 1989, Rebecca Schaeffer, star of the television series “My Sister Sam,” was attacked and murdered outside her Los Angeles home by Robert Bardo, an obsessed fan who had stalked the actress for over two years.¹ With the help of a private detective, Bardo was able to obtain her address through a search of driver’s license records at the California Department of Motor Vehicles.² In response to Schaeffer’s murder and the murders of four other women who had been stalked,³ California became the first state to enact an anti-stalking law in 1990.⁴ Other states followed suit, implementing their own anti-stalking statutes. However, because the law varied from state to state, Congress finally asked the National Institute of Justice (NIJ) to develop a model anti-stalking law in 1993.⁵

Even with these anti-stalking laws in place, the crime figures are alarming. According to recent statistics, approximately 370,990 men

* J.D., University of California, Hastings College of the Law, 2003. I would like to thank Professor Lois A. Weithorn for her guidance, editing, and support in publishing this Note.

1. *Obsessed Fan Gets Life in Actress’ Death*, L.A. TIMES, Dec. 22, 1991, Metro, § B, at 5.

2. Aaron Chambers, *Consumer Privacy Concerns Not Translating into New Law*, CHICAGO DAILY LAW BULLETIN, Apr. 21, 2001, at 3.

3. NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR STATES 12 (1993) [hereinafter MODEL ANTI-STALKING CODE].

4. OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, STALKING AND DOMESTIC VIOLENCE: THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 16 (1998). Available at <www.ojp.gov/vawo/grants/stalk98> (visited Oct. 7, 2003) [hereinafter DOJ REPORT].

5. MODEL ANTI-STALKING CODE, *supra* note 3, at 5.

and 1,006,970 women in this country are terrorized by stalkers each year.⁶ Contrary to media portrayals, celebrities and public figures do not compose the majority of stalking victims. In fact, stalking of celebrities comprises only ten percent of all stalking cases reported.⁷ While women are four times more likely to be victimized by male stalkers, stalking victims come from "every walk of life, from every state in the nation, and from countries all over the globe."⁸ These numbers seem to indicate that the laws the United States currently has in place to combat stalking are still largely ineffective.

This Note first emphasizes the importance of treating stalking as a unique and serious crime with a case study of a woman who was stalked and ultimately murdered by her estranged husband. It then discusses the historical developments that led to the creation of the Model Anti-Stalking Code. Next, it describes the different categories of stalkers and the legal responses to stalking. The laws in the United States are then compared with the newly implemented anti-stalking laws in Japan. Enacted almost a decade after the first anti-stalking statute was established in the United States, Japan's new anti-stalking law has been very effective in curbing the activities of stalkers. Finally, the Note concludes that creating an effective legal response to the problem of stalking in the United States requires drafting constitutionally valid statutes, mandatory police education and training on the subject, prevention and early intervention, and the incorporation of many of Japan's victim-oriented measures.

I. The Impact of Stalking on Victims

On April 15, 1996, Maria Teresa Macias was shot to death by her husband Avelino.⁹ During their marriage, Avelino physically and sexually abused Maria and their children.¹⁰ When the abuse became unbearable, Maria fled with her children to a nearby women's shelter but this did not stop Avelino's abusive behavior.¹¹ In the year before

6. DOJ REPORT, *supra* note 4, at 6.

7. NATIONAL VICTIM ASSISTANCE ACADEMY TEXTBOOK, Ch. 22.2: Stalking (2002), available at <www.ojp.gov/ovc/assist/nvaa2002> (visited Oct. 7, 2003) [hereinafter NVAA ON STALKING].

8. DOJ REPORT, *supra* note 4, at 10; Keirsten L. Walsh, *Safe and Sound at Last? Federalized Anti-Stalking Legislation in the United States and Canada*, 14 DICK. J. INT'L L. 373, 376 (1996).

9. *Estate of Macias v. Ihde*, 219 F.3d 1018, 1026 (9th Cir. 2000).

10. *Id.* at 1021.

11. *Id.*

her death, he aggressively stalked her, harassed her and repeatedly threatened to kill her.¹² Maria was able to obtain a temporary restraining order but Avelino constantly violated it by waiting outside her home, calling her, following her to work and leaving flowers and cards for her.¹³

Although Maria repeatedly sought help from the Sonoma County Sheriff's Department, they never arrested or cited Avelino.¹⁴ In fact, in an incident where Maria called the Sheriff's Department because Avelino had forced his way into her home, the reporting Deputy did not file a report, as mandated by state law when there is a domestic violence-related call for assistance.¹⁵ In the Deputy's declaration, he alleged that while Avelino had forced his way into the home, he "simply walked into the room, hugged and kissed his children and then left without incident."¹⁶

Furthermore, after advising Maria that she would need to provide detailed written documentation of each event to support a claim for stalking, the Sheriff's Department treated each of Maria's calls for help as more of a nuisance.¹⁷ In another incident where Maria had called the Sheriff's Department because Avelino had telephoned her again, the Deputy actually told the dispatcher, "I can't keep filing a report every time she calls."¹⁸ At trial, Maria's mother, Sara Rubio Hernandez testified that in the last few months of her life, the Sheriff's Department ignored more than twenty of Maria's calls for help.¹⁹ Despite the fact that Maria did everything possible to protect herself and her children, law enforcement ultimately failed her. At the crime scene, the police found two spiral notebooks in which Maria had diligently documented every violation as instructed by the Sheriff's Department, and two audiocassettes on which

12. *Id.* at 1021-26.

13. *Id.*

14. *Id.*

15. *Id.* at 1021-22; under California Penal Code § 13730, law enforcement agencies are required to write a report for all domestic violence-related incidents and write the words "Domestic Violence" on the face of the report.

16. *Estate of Macias*, 219 F.3d at 1021.

17. *Id.* at 1024.

18. *Id.* at 1024-25.

19. *Unprecedented Million Dollar Settlement: Sheriff Held Accountable in Domestic Violence Homicide of Maria Teresa Macias*, at <www.justicewomen.com/macias_settlement.html> (visited Nov. 11, 2003) [hereinafter *Settlement*].

Avelino had left threatening telephone messages.²⁰ On June 18, 2002, the Sonoma County Sheriff's Department agreed to pay a million dollar settlement to Maria's family in the first ever monetary award by law enforcement for their failure to protect a domestic violence victim leading up to her homicide.²¹ While the settlement is considered a huge victory for domestic violence victims everywhere, it came too late for Maria Teresa Macias, who had to pay the ultimate price.

While not every case of stalking results in the death of the victim, stalking has a tremendous emotional and psychological impact on the lives of those who are targeted. Some victim service professionals even contend that "the threat of violence inherent in stalking cases can take a higher toll on its victims than those who have been victims of completed acts of violence."²² Many stalking victims experience signs of stalking-related stress such as loss of sleep, weight loss, depression, anxiety, and difficulty concentrating.²³ Some victims even suffer from Post-Traumatic Stress Disorder, having experienced "an event that is outside the range of usual human experience, and that would be markedly distressing to almost anyone," such as receiving a threat to one's life, children or spouse.²⁴ Victims of this disorder usually show re-experiencing symptoms such as having "recurrent and intrusive distressing recollections of the event"; avoidance symptoms including an "inability to recall an important aspect of the trauma" or feeling detached from others; and arousal symptoms like "irritability or outbursts of anger" or being "hypervigilant."²⁵ According to a 1998 DOJ study, 30% of women and 20% of men in stalking cases have sought psychological counseling.²⁶

In addition to losing their personal support systems as many

20. *Estate of Macias*, 219 F.3d at 1026.

21. *Settlement*, *supra* note 19. Maria's family filed a civil action under 42 U.S.C. § 1983 against the defendants on the ground that they "denied Maria's right to equal protection by providing her inferior police protection on account of her status as a woman, a Latina, and a victim of domestic violence." *Estate of Macias*, 219 F.3d at 1019.

22. NVAA ON STALKING, *supra* note 7.

23. *Id.*

24. Kathleen G. McAnaney et al., *From Imprudence to Crime: Anti-Stalking Law*, 68 NOTRE DAME L. REV. 819, 851 (1993) (citing to AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 199, 250 (3d ed. 1987)).

25. *Id.* at 851 n.147.

26. DOJ REPORT, *supra* note 4, at 19.

friends, family, and co-workers are “unable to sustain levels of long-term support,” stalking victims often lose their economic security.²⁷ The DOJ study showed that 26% of women lost time from work as a result of the victimization²⁸ and 7% said they never returned to work.²⁹ Some women have even been fired from their jobs by their unsympathetic employers who were unwilling to accommodate to their special circumstances.³⁰

II. The Historical Development of Anti-Stalking Legislation in the United States

Prior to the enactment of anti-stalking legislation, states used similar laws, such as civil protection orders, menacing statutes and harassment statutes, to deal with the stalking problem.³¹ Since these laws treat the individual acts of the stalker as separate and unrelated offenses, their use did not address the core problem of the crime of stalking—repetitive behavior.³² With these earlier statutes, most victims found that their stalkers’ actions did not fall within the narrow definitions of the law. For example, Alabama’s statute against menacing requires that the defendant intentionally place the victim in “fear of imminent serious physical injury.”³³ Likewise, harassment statutes in states like Delaware only criminalize overt threats made with the intent to harass, annoy or alarm the victim.³⁴ The requirement that stalkers possess the intent to harass or cause fear in their victims ignores the fact that stalkers who suffer from a personality or mental disorder³⁵ will not always possess such an

27. NVAA ON STALKING, *supra* note 7.

28. DOJ REPORT, *supra* note 4, at 20. While the survey did not ask the victims why they lost time from work, it assumed that they missed work to attend court hearings, to meet with their attorney or psychologist, or to just avoid contact with their stalker.

29. *Id.*

30. NVAA ON STALKING, *supra* note 7.

31. Jennifer L. Bradfield, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN’S L.J. 229, 236 (1998).

32. Walsh, *supra* note 8, at 381.

33. ALA. CODE § 13A-6-23 (2002).

34. DEL. CODE ANN. tit. 11, § 1311(a) (2002).

35. State statutes that contain language about “mentally disordered persons” do not include perpetrators of domestic violence. MODEL ANTI-STALKING CODE, *supra* note 3, at 37. See also NVAA ON STALKING, *supra* note 7 (stating that “one trait all stalkers share is that they suffer from a personality or mental disorder, if not both.”).

intent.³⁶

States also relied on domestic violence laws, often requiring the plaintiff to show that the defendant "attacked, beat, molested, or otherwise threatened bodily harm."³⁷ Yet unlike the victim of domestic violence who can show the court evidence of her abuse, such as a black eye, stalking victims usually do not have physical evidence that they can use against their stalkers.³⁸ These statutes were not designed to combat stalking, and so the penalties associated with violations of these laws were not strong enough to act as a deterrent. Punishment for violators of harassment statutes range from small fines to a couple of months in jail.³⁹ Furthermore, most harassment statutes do not give stalkers harsher punishments for repeat offenses.⁴⁰

Recognizing the ineffectiveness of these statutes, the states began to implement statutes that specifically addressed the issue of stalking. California led the way in 1990, passing the first anti-stalking statute after the highly publicized murder of actress Rebecca Shaeffer.⁴¹ Other states quickly followed suit. Today, all fifty states and the District of Columbia have anti-stalking statutes. In 1996, the federal government enacted the Interstate Stalking Punishment and Prevention Act to prohibit stalkers from traveling across state lines in pursuit of their victims.⁴²

These anti-stalking statutes are an improvement over the traditional approaches because they are specifically designed to cover a broader range of stalking behavior, and are available to more people.⁴³ Anti-stalking statutes are more preventive because the

36. MODEL ANTI-STALKING CODE, *supra* note 3, at 48 (stating that a stalking defendant who suffers from delusions "may not intend to cause fear; he instead may intend to establish a relationship with his victim.")

37. Julie Miles Walker, Comment, *Anti-Stalking Legislation: Does It Protect the Victim Without Violating the Rights of the Accused?*, 71 DENV. U. L. REV. 273, 279 (1993).

38. *Id.*

39. Bradfield, *supra* note 31, at 242.

40. *Id.* at 242-43.

41. CAL. PENAL CODE § 646.9 (Deering 2003). In 1994, California also enacted the Driver's Privacy Protection Act which prohibits the DMV from releasing personal information of registrants. Chambers, *supra* note 2, at 3.

42. DOJ REPORT, *supra* note 4, at 23.

43. California, for example, has extended its definition of "immediate family" to mean "any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household." CAL. PENAL

police can now intervene and arrest stalkers *before* they physically harm the victim.⁴⁴ Furthermore, many anti-stalking statutes have enhanced penalties if a stalker “violates a protective order, brandishes a weapon . . . or has committed a prior stalking offense.”⁴⁵

While implementation of anti-stalking statutes has helped deter and incapacitate a good number of stalkers because police officers have a basis on which to arrest stalkers,⁴⁶ the statutes in many states are still problematic. This is because some states still require that the stalker *overtly* threaten his⁴⁷ victim (such as by physical assault)—thus allowing the stalker who threatens his victim by his *conduct* (such as following the victim) to escape the law.⁴⁸ Likewise, some states still require the stalker to possess the intent to cause fear, enabling the stalker who suffers delusions to continue stalking his victim because he does not have the requisite *mens rea* intent to cause fear.⁴⁹

With fifty different states enacting fifty different anti-stalking statutes, stalkers were given “geographic leeway with which to terrorize their victims.”⁵⁰ This was due to the fact that what was considered stalking in one state was not always defined as such in other states.⁵¹ To deal with this problem, Congress mandated that the NIJ develop a model anti-stalking law that the states could follow.⁵² In October 1993, the NIJ completed and presented the model statute to Congress and the states.⁵³ California was the first state to amend its

CODE § 646.9(1).

44. Silvia A. Strikis, Note, *Stopping Stalking*, 81 GEO. L.J. 2771, 2775 (1993).

45. MODEL ANTI-STALKING CODE, *supra* note 3, at 28. While separate offense statutes typically carry punishments ranging from a small fine to a few months in jail, stalking statutes generally carry punishments of up to one year for the first offense (e.g., CAL. PENAL CODE § 646.9(a)), and a more severe penalty if the stalker violates a protective order (e.g., WASH. REV. CODE § 9A.46.110(5)(b) (2003)).

46. Karen Tumulty & Stephanie Chavez, *Domestic Abuse Laws; Victims Find Little Safety in System*, L.A. TIMES, Sept. 4, 1989, at 1 (“A good arrest does not have to lead to a conviction. A good arrest leads to a change in behavior,” said Edmund Stubbing, an ex-New York City police officer who now works for the nonprofit Victim Services Agency and organizes seminars to help police executives set up pro-arrest systems.).

47. Although stalking is a gender-neutral crime, for convenience of style, “he,” “his,” and “him” are used throughout this note to refer to both male and female stalking defendants.

48. E.g., ALA. CODE § 13A-6-90 (2002) (requiring both threat and conduct).

49. MODEL ANTI-STALKING CODE, *supra* note 3, at 47-48.

50. Walsh, *supra* note 8, at 383.

51. *Id.*

52. MODEL ANTI-STALKING CODE, *supra* note 3, at 5.

53. Bradfield, *supra* note 31, at 246.

narrow statute.⁵⁴ Other states soon followed, either implementing or broadening their statutes to protect stalking victims more effectively.⁵⁵

III. Legal Background

In order to be valid, all anti-stalking statutes must comply with certain constitutional and criminal law requirements. Meeting these basic guidelines is essential to protecting the safety and well-being of the victim while guarding the legal rights of the accused stalker.

A. Constitutional Law

Under the Fifth and Fourteenth Amendments to the U.S. Constitution, citizens of states are entitled to the benefits and protections of the First Amendment and to due process.⁵⁶ The U.S. Supreme Court has ruled that in order to protect an individual's freedom of expression, a statute cannot be overly broad or vague.⁵⁷ A statute is overbroad if, in addition to proscribing activities which may be constitutionally forbidden, it also "criminalizes an intolerable range of constitutionally protected conduct."⁵⁸ "[W]here conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."⁵⁹

A statute is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement."⁶⁰ According to the vagueness doctrine, the more important aspect is not providing actual notice, but the requirement that the legislature provide minimal guidelines to govern law enforcement.⁶¹ Such minimal guidelines prevent the police, prosecutors and juries from exercising standardless sweeps of suspects.⁶² States can restrict speech and

54. California first amended its statute in 1992 and did so again in 1993, 1994, 1995, 1998, and 2000. CAL. PENAL CODE § 646.9 (Deering 2003).

55. MODEL ANTI-STALKING CODE, *supra* note 3, at 12-13.

56. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

57. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

58. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990).

59. *Broadrick*, 413 U.S. at 615.

60. *Kolender*, 461 U.S. at 357.

61. *Id.* at 358.

62. *Id.*

freedom of movement, however, as long as the statute serves “a compelling state interest and is narrowly drawn to achieve that end.”⁶³ Thus, for an anti-stalking statute to pass constitutional muster, it must clearly define what behavior is proscribed without trampling on constitutionally protected conduct.

B. Criminal Law

With very few exceptions, every crime involves two components: “(1) the ‘*actus reus*,’ the physical or external portion of the crime; and (2) the ‘*mens rea*,’ the mental or internal feature.”⁶⁴ The term *actus reus* requires a person to engage in “a voluntary act (or a failure to perform a voluntary act that one has a legal duty to perform) that causes social harm” such as death or injury to another.⁶⁵ This *actus reus* requirement is an essential element of Anglo-American criminal jurisprudence because it prevents the law from punishing people for their “unacted-upon intentions.”⁶⁶

In addition to requiring an *actus reus*, the law mandates that a person act with the appropriate *mens rea* (guilty mind).⁶⁷ Traditionally, the term *mens rea* was associated with the notion of “moral blameworthiness” such that the law did not require that the actor cause the harm in question with any “specific mental state.”⁶⁸ However, over time, *mens rea* has evolved to mean “the particular mental state provided for in the definition of an offense.”⁶⁹

The most common *mens rea* terms used in anti-stalking statutes are intentional, willful, malicious, purposeful, and knowing. At common law, a person acts “intentionally” to cause social harm if: “(1) it is his desire (i.e., his conscious object) to cause the social harm; or (2) he acts with knowledge that the social harm is virtually certain to occur as a result of his conduct.”⁷⁰ Although the term “willful” is often used as a synonym for “intentional,” it can also mean “an act

63. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

64. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 69 (2d ed. 1995).

65. *Id.* “Social harm” can be defined as the “negation, endangering, or destruction of an individual, group or state interest which was deemed socially valuable.” *Id.* at 96.

66. *Id.* at 71.

67. *Id.* at 101.

68. *Id.* at 102.

69. *Id.* at 103.

70. *Id.* at 105.

done with a bad purpose” or with “an evil motive.”⁷¹ A person acts with “malice” if he “intentionally or recklessly causes the social harm prohibited by the offense.”⁷² “Purposely” is a Model Penal Code term that has two definitions.⁷³ If used in the “context of a result or conduct, a person acts ‘purposely’ if it [is] his ‘conscious object to engage in conduct of that nature or to cause such a result.’”⁷⁴ With respect to attendant circumstances, a person acts “purposely” if he “is aware of the existence of such circumstances or he believes or hopes that they exist.”⁷⁵ The term “knowingly” is also a Model Penal Code term that has two definitions.⁷⁶ As applied to results, an actor acts “knowingly” when he “is aware that it is practically certain that his conduct will cause such a result.”⁷⁷ As it pertains to conduct and attendant circumstances, a person acts “knowingly” if he is “aware that his conduct is of that nature or that such [attendant] circumstances exist.”⁷⁸

IV. The Model Anti-Stalking Code

The Model Anti-Stalking Code for States (Model Code) requires both *actus reus* and *mens rea*. The Model Code defines stalking as:

Section 1. For purposes of this code:

“Course of conduct” means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;

“Repeatedly” means on two or more occasions;

“Immediate family” means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

Section 2. Any person who:

purposefully engages in a course of conduct directed at a specific

71. *Id.* at 111.

72. *Id.* at 116.

73. *Id.* at 120-121.

74. *Id.* at 121 (citing MODEL PENAL CODE § 2.02(2)(a)(i)).

75. *Id.* at 121 (citing MODEL PENAL CODE § 2.02(2)(a)(ii)).

76. *Id.* at 121.

77. *Id.* (citing MODEL PENAL CODE § 2.02(2)(b)(ii)).

78. *Id.* at 122 (citing MODEL PENAL CODE § 2.02(2)(b)(i)).

person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and

has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of death of himself or herself or a member of his or her immediate family; and

whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;

is guilty of stalking.⁷⁹

Although the degree to which states have adopted the Model Anti-Stalking Code varies, most states define stalking as the “willful, malicious, and repeated following and harassing of another person.”⁸⁰ It involves a series of individual acts that accumulate and build on one another.⁸¹ Most states require the following three elements to be satisfied: threatening behavior, a course of conduct and intent to cause fear.⁸²

A. *Threat Requirement*

Threats made by stalkers generally take two forms: express oral or written threats, or threats implied by conduct. Depending on the state, the stalker must meet one of three different types of threat requirements: (1) threat *or* conduct; (2) threat *and* conduct; or (3) threat and the intent and apparent ability to carry out the threat.⁸³

The first category, requiring either express threats *or* conduct, is the most flexible. The majority of states like Delaware that have adopted this threat requirement do not require the perpetrator to make an explicit threat.⁸⁴ These types of statutes recognize the fact

79. MODEL ANTI-STALKING CODE, *supra* note 3, at 43-44.

80. *Id.* at 13.

81. Walsh, *supra* note 8, at 381.

82. The first two elements satisfying the *actus reus* requirement and the third satisfying the *mens rea* requirement.

83. MODEL ANTI-STALKING CODE, *supra* note 3, at 22-24.

84. DEL. CODE ANN. tit. 11, § 1312A(b)(1) (2002) (defining “Course of conduct” (and thus threats) as “repeatedly maintaining a visual or physical proximity to a

that a stalker will not always expressly threaten his victim, but rather will engage in conduct that implies a threat, such as constantly following the victim or parking in front of her home.⁸⁵ Broadly constructed, this type of threat requirement offers the victim the most protection.

In contrast, the second category provides less protection to the victim by requiring both threat *and* conduct.⁸⁶ In Alabama, for example, a person is guilty of the crime of stalking if he "intentionally and repeatedly follows or harasses another person *and* . . . makes a credible threat, either expressed or implied, with the intent to place that person in reasonable fear of death or serious bodily harm"⁸⁷ By requiring both threat and conduct, this type of statute fails to protect stalking victims who are not explicitly threatened by their stalker.⁸⁸ Thus, an ex-husband could intentionally engage in acts that he knows will terrify his former wife, and which he intends to be a threat, without suffering any legal consequences.⁸⁹

The third category requires an intent and apparent ability to carry out the threat as well as the making of a threat.⁹⁰ In addition to requiring threat and conduct, some states, like California, have this additional requirement.⁹¹ Like the second category, this category also fails to protect victims who have not been explicitly threatened by their stalkers. Consequently, even in situations where the stalker does overtly threaten his victim, as long as he "does not look strong or well-armed enough to carry out his threat" at the time he makes

person or repeatedly conveying verbal or written threats or threats implied by conduct, or repeatedly committing any acts constituting any criminal offense as defined by the Delaware Code, or a combination thereof, and which reflects a continuity of purpose.")

85. Max Albright, *Stalker Preys On Woman Despite Complaints to Police*, DALLAS MORNING NEWS, Dec. 13, 1992, at 58A.

86. MODEL ANTI-STALKING CODE, *supra* note 3, at 13.

87. ALA. CODE § 13A-6-90(a) (2002) (emphasis added).

88. Kimberly A. Tolhurst, Comment, *A Search For Solutions: Evaluating the Latest Anti-Stalking Developments and the National Institute of Justice Model Stalking Code*, 1 WM. & MARY J. WOMEN & L. 269, 281 (1994).

89. *Id.* at 281-82.

90. MODEL ANTI-STALKING CODE, *supra* note 3, at 22-24.

91. Under California Penal Code § 646.9(a) a person is guilty of the crime of stalking if he "willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person *and* who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family" (emphasis added).

the threat, this additional requirement will not be met.⁹² In reality, however, these additional requirements are unnecessary because most anti-stalking statutes require that the defendant has “criminal intent to cause fear in the victim” by engaging in conduct that is either “willful,” “purposeful,” “intentional,” or “knowing.”⁹³

Several states have additional requirements that the prosecution must prove before the stalker is convicted. California, for instance, has a “credible threat” requirement defined as verbal, written, implied or electronically communicated threats made with the intent to place the victim “in reasonable fear” for her safety.⁹⁴ While this objective “reasonableness” standard may act as a safeguard by protecting defendants from unreasonable charges, it is another obstacle victims have to overcome because actions that appear to be a “credible threat” to a victim could easily be dismissed by the judge as being harmless.⁹⁵ To deal with this problem, states should define “credible threat” in subjective relation to the defendant, thus making it criminal for the defendant to make threats he knows or should know will cause fear in his victim.⁹⁶ By including actions that both the stalker and the victim will understand as constituting a threat, such a standard would also protect defendants from unreasonable charges.⁹⁷

By defining a “credible threat” as a verbal or written threat, many states do not take into consideration threats implied by conduct such as sending the victim dead flowers. Acknowledging that in such situations, the victim’s fear is usually just as great as if the stalker had directly threatened her, the NIJ intentionally left the credible threat requirement out of the model code, requiring instead “threats implied by conduct.”⁹⁸ Since stalkers do not usually threaten their victims directly, this flexible definition of stalking suggested by the NIJ is essential in successfully prosecuting these types of stalkers.⁹⁹

Recognizing that a stalker may also threaten to harm the victim’s family, the Model Code suggested that threatening harm to an immediate family member could and should be used as evidence of

92. Tolhurst, *supra* note 88, at 280.

93. MODEL ANTI-STALKING CODE, *supra* note 3, at 21. *E.g.*, CAL. PENAL CODE § 646.9(a) (Deering 2003).

94. CAL. PENAL CODE § 646.9(g).

95. Bradfield, *supra* note 31, at 250.

96. *Id.* at 250-51.

97. *Id.* at 251.

98. MODEL ANTI-STALKING CODE, *supra* note 3, at 45.

99. Bradfield, *supra* note 31, at 251.

stalking against the defendant.¹⁰⁰ Following California's lead, the NIJ actually adopted a definition of "immediate family" much broader than the traditional nuclear family.¹⁰¹ In addition to threats made to a victim's "spouse, parent, child or sibling," the Model Code includes threats made to "any other person who regularly resides in the [victim's] household or who within the prior six months regularly resided in the household."¹⁰² Unfortunately, there are still some states, like Colorado,¹⁰³ that do not criminalize threats made against non-family members, such as boyfriends or roommates.

The problem with the Model Code's definition of immediate family is that while it encompasses threats made against roommates and live-in boyfriends, it excludes threats made against individuals who have, or have had, an intimate or romantic relationship with the victim but who *do not reside* with the victim. The NIJ was afraid that broadening the definition of "immediate family" would lead to challenges that the statute is overbroad.¹⁰⁴ However, behavioral patterns of stalkers clearly show that individuals in an intimate or romantic relationship with the victim often face the same danger as immediate family members if not more.¹⁰⁵ This is because stalkers tend to view these individuals as the only barrier standing between them and the victim, especially if the stalker has had a former intimate relationship with the victim.¹⁰⁶

B. Course of Conduct

Almost all anti-stalking statutes require that the stalker engage in a "course of conduct," defined as "a series of acts over a period of time, however short, evidencing a continuity of purpose."¹⁰⁷ States like Illinois and Michigan delineate the *actus reus* element even further, specifying how many acts must occur and over what period of time.¹⁰⁸ Other states specifically define what acts constitute stalking,

100. MODEL ANTI-STALKING CODE, *supra* note 3, at 45.

101. *Id.*

102. *Id.*

103. COLO. REV. STAT. § 18-9-111(4)(c)(III) (2002).

104. MODEL ANTI-STALKING CODE, *supra* note 3, at 45.

105. Bradfield, *supra* note 31, at 252.

106. McAnaney et al., *supra* note 24, at 840 n.93.

107. MODEL ANTI-STALKING CODE, *supra* note 3, at 21.

108. Illinois refers to acts committed "on at least 2 separate occasions." 720 ILL. COMP. STAT. 5/12-7.3(a) (2003). Michigan requires a "series of 2 or more separate, noncontinuous acts." MICH. COMP. LAWS § 750.411i(1)(a) (2002).

ranging from nonconsensual communication to lying in wait.¹⁰⁹ In creating the model anti-stalking law, the NIJ was aware that “ingenuity on the part of the alleged stalker” would allow him to get around the law.¹¹⁰ Thus, instead of listing “specifically proscribed acts” the Model Code prohibits defendants from “engaging in ‘a course of conduct’ that would cause a reasonable person fear.”¹¹¹

C. *Mental State Requirement*

Currently, the majority of states require that a stalker possess the *mens rea* to cause reasonable fear, whether it be “willful,” “purposeful,” “intentional,” or “knowing.”¹¹² In addition, states like Delaware require that the stalker’s conduct *actually* “induces such fear” in the victim.¹¹³ As the Model Code suggests, anti-stalking statutes that simply require the stalker’s actions to be “knowing” afford the victim much more protection.¹¹⁴ This is because the “suspected stalker often suffers from a delusion that the victim is actually in love with him,” and even though he may not intend to cause fear, as long as knows or should know that his actions cause fear, he can be successfully prosecuted for stalking.¹¹⁵

V. Types of Stalkers

Although the stalker may be an ex-spouse, ex-lover, obsessed fan, friend or complete stranger, experts have placed stalkers into five categories: erotomania, love obsession, simple obsession, vengeance and cyberstalking.¹¹⁶

A. *Erotomania Stalking*

This type of stalker suffers from a delusional disorder in which

109. MODEL ANTI-STALKING CODE, *supra* note 3, at 16-20.

110. *Id.* at 44.

111. *Id.*

112. *Id.* at 21.

113. DEL. CODE ANN. § 1312A(a) (2002).

114. MODEL ANTI-STALKING CODE, *supra* note 3, at 47-48.

115. *Id.* at 48. It is important to note that even though the Model Penal Code uses the terms “knowing” and “should know” interchangeably, they are very different standards in criminal law. In contrast to “knowing” (*See* discussion *infra* Part II.B.), “should know” is generally associated with the criminal negligence standard defined as “conduct that represents a gross deviation from the standard of reasonable care.” DRESSLER, *supra* note 64, at 113 (emphasis omitted).

116. NVAA ON STALKING, *supra* note 7.

the stalker believes that a person of the opposite sex and of higher status is in love with the stalker.¹¹⁷ The victim is usually a public figure or celebrity who does not know and has never met the stalker.¹¹⁸ Erotomaniacs believe that "a relationship *already exists* between themselves and the objects of their obsession."¹¹⁹ The stalker is convinced that were it not for some external force or influence, the victim would return the affection.¹²⁰ Erotomaniacs "seek fame and self-worth by basking in the celebrity of others."¹²¹

B. Love Obsession Stalking

Like the erotomaniac, the love obsessional stalker rarely knows his victim.¹²² At most, the stalker and his victim are casual acquaintances (i.e. neighbors, co-workers).¹²³ This stalker typically seeks to raise his own self-esteem by associating with victims he holds in high regard.¹²⁴ In contrast to the erotomaniac, love obsession stalkers seek to *establish* a personal relationship with their victims.¹²⁵ They will incorporate their victims into their fantasy relationships and may try to force their victims into participating.¹²⁶ These types of stalkers, like Robert Bardo, "are so desperate to establish a relationship—*any relationship*—that they 'settle' for negative relationships," even if this means killing the person they are obsessed with.¹²⁷

C. Simple Obsession Stalking

This category represents 60% of all stalking cases and is different from the previous two categories because it involves a *prior relationship* between the stalker and the victim.¹²⁸ This type of stalker is usually a former spouse, lover, employer or neighbor who begins to

117. Harvey Wallace, *A Prosecutor's Guide to Stalking*, PROSECUTOR, Jan.-Feb. 1995, at 26-27.

118. *Id.*

119. NVAA ON STALKING, *supra* note 7.

120. Wallace, *supra* note 117, at 43.

121. NVAA ON STALKING, *supra* note 7.

122. Wallace, *supra* note 117, at 43.

123. NVAA ON STALKING, *supra* note 7.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

stalk the victim after the relationship has soured.¹²⁹ Many of the simple obsession cases are “extensions of a previous pattern of domestic violence and psychological abuse,” involving the same dynamics of power and control.¹³⁰ Like love obsession stalkers, these stalkers lack self-esteem and try to overcome their feelings of powerlessness by demeaning and demoralizing the people closest to them, usually their spouse.¹³¹ Victims of simple obsession stalkers occupy a unique position. As the source of the stalker’s self-esteem (and thus the stalker’s own identity), their attempt to remove themselves from the abusive situation often leads to the stalker taking “drastic steps to restore [their] self-esteem.”¹³² Recent statistics show that 30% of all female homicides are committed by intimate partners.¹³³ This percentage increases to 75% if the victims were also domestic violence victims.¹³⁴

D. Vengeance Stalking

This type of stalking, also known as terrorism stalking, is different from the other three categories because the stalker does not necessarily want to establish a personal relationship with the victim.¹³⁵ Rather, they use stalking as a way to punish their victims for a perceived wrong they believe that the victim has inflicted on them.¹³⁶ The most common type of vengeance stalkers are ex-employees who stalk their previous employers because they feel that they were unjustly fired from their jobs.¹³⁷

E. Cyberstalking

With the invention of the internet, stalkers have found another way to stalk their victims. The term cyberstalking is “generally used to refer to the use of the Internet, e-mail, or other telecommunication technologies to harass or stalk another person.”¹³⁸ Cyberstalkers terrorize their victims in a variety of ways, from sending them

129. Wallace, *supra* note 117, at 43.

130. NVAA ON STALKING, *supra* note 7.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

obscene or threatening e-mail, to setting up web pages with personal or fictitious information about them.¹³⁹ According to a report conducted in 1999, of the 80 million adults and 100 million children with access to the internet, there are approximately “tens or even hundreds of thousands of cyberstalking victims in the United States.”¹⁴⁰ Victims of cyberstalkers face particular enforcement challenges because of problems with “jurisdiction, anonymity, and the constitutionally-protected free speech.”¹⁴¹

VI. Legal Responses to Stalking

A. *Classification and Sentencing*

Stalkers may be “obsessive, unpredictable, and potentially violent.”¹⁴² Acknowledging that stalkers tend to engage in a series of acts that become increasingly dangerous to the victim,¹⁴³ the NIJ in 1993 suggested that states should “consider establishing a continuum of charges that could be used by law enforcement officials to intervene at various stages.”¹⁴⁴ The NIJ also suggested that states implement a felony stalking statute to handle the more serious stalking cases and address less serious stalking behavior with existing harassment or intimidation statutes.¹⁴⁵ Classification of stalking as a felony, even for a first offense, would “assist in the development of the public’s understanding of stalking as a unique crime, as well as permit the imposition of penalties that would punish appropriately the [stalker] and provide protection for the victim.”¹⁴⁶

Today, all fifty states and the District of Columbia classify stalking as either a misdemeanor, a felony or both.¹⁴⁷ The majority of states classify the first offense as a misdemeanor punishable by up to

139. *Id.*

140. *Id.*

141. *Id.*

142. MODEL ANTI-STALKING CODE, *supra* note 3, at 49.

143. Stalking involves “a series of discrete, individual acts, each one building upon the next.” Walsh, *supra* note 8, at 381. Analyzed in the aggregate, seemingly innocent behavior such as sending flowers or love letters takes on a threatening character.

144. MODEL ANTI-STALKING CODE, *supra* note 3, at 49.

145. *Id.* at 46.

146. *Id.*

147. DOJ REPORT, *supra* note 4, at 23, 25.

one year in prison.¹⁴⁸ Although some states will treat subsequent stalking offenses as misdemeanors, most states treat the violations as a felony.¹⁴⁹

B. Methods of Protection

Currently, stalking victims have three main legal avenues available to them. First, victims can obtain a restraining or civil protective order prohibiting the stalker from contacting them or coming within a certain proximity of them.¹⁵⁰ Violators of these orders may be held in contempt, fined or incarcerated.¹⁵¹ For example, in states like Connecticut and Michigan, violation of a restraining order increases the stalking offense from a misdemeanor to a felony.¹⁵² In California, stalkers who violate protective orders can be charged with a felony instead of just a misdemeanor.¹⁵³

Although civil protective orders give the stalker formal notice to stay away from the victim, many states have substantive and procedural limitations that make them inadequate to protect victims. For example, in some states, a victim cannot obtain a protective order unless the “applicant is married or has been married to the person against whom the protective order is sought,” or the applicant “live[s] in the same residence as the person against whom the protective order is sought.”¹⁵⁴ Such strict limitations ignore the fact that many people are stalked by “complete strangers, casual acquaintances, or former intimate partners” that they did not live with.¹⁵⁵ Unlike criminal remedies that place the burden on the prosecutor to convict violators, civil protective orders place the burden on the victim to produce evidence of an imminent threat.¹⁵⁶

Furthermore, these protective orders are merely “paper shields” that stalkers typically ignore.¹⁵⁷ Because of their obsessive nature,

148. *Id.*; e.g., CAL. PENAL CODE § 646.9(a) (Deering 2003).

149. DOJ REPORT, *supra* note 4, at 23-25.

150. See MODEL ANTI-STALKING CODE, *supra* note 3, at 76.

151. Walker, *supra* note 37, at 278.

152. E.g., CONN. GEN. STAT. § 53a-181c (2003); MICH. COMP. LAWS § 750.411i(2)(a)h-I (2002).

153. CAL. PENAL CODE § 646.9(b) (Deering 2003).

154. MODEL ANTI-STALKING CODE, *supra* note 3, at 76.

155. Bradfield, *supra* note 31, at 237.

156. Walker, *supra* note 37, at 278.

157. Kevin Fagan, *New Focus on Deadly Stalkers*, S.F. CHRON., Jan. 11, 1993, at A1 (quoting Officer Dana Flynn as saying, “There’s no way we can watch everyone [who has] got a TRO (temporary restraining order), so the woman is taking an

stalkers will either "wait out" protective orders since they are usually temporary, or violate the orders.¹⁵⁸ According to a 1998 study of victims who had obtained restraining orders, 69% of women and 81% of men said that their stalker violated the order.¹⁵⁹ Although the police have the power and authority to arrest a stalker immediately upon violation of the order, these orders are not always enforced by law enforcement.¹⁶⁰ As such, victims find themselves in more danger because the restraining order has either given them a false sense of security¹⁶¹ or has angered the stalker.

Second, the law allows for the temporary civil commitment of stalkers to evaluate their mental condition.¹⁶² Depending on the state, the court may order an evaluation or counseling of the stalker either before trial,

U.S. stalkers only have to serve 50% of their sentence, even though their obsessions last much longer.

as a condition of probation or as part of the sentence.¹⁶³ Although these commitments are relatively short, they can be quite effective because they offer counseling and other support to stalkers in the hopes that it will terminate the stalker's behavior.¹⁶⁴ States like California only require the court to consider whether a convicted stalker would benefit from mental health treatment.¹⁶⁵ As studies conducted by the NIJ have revealed, many stalkers suffer from "psychiatric or psychological disorders" and are thus not easily deterred by criminal penalties or the threat of imprisonment.¹⁶⁶ Consequently, the best way to prevent these types of stalkers from harming their victims is to incapacitate them until they have received adequate mental health treatment.¹⁶⁷

enormous risk in getting one. But it's a risk she has to take if she wants to end the problem.")

158. Walker, *supra* note 37, at 280.

159. DOJ REPORT, *supra* note 4, at 18.

160. NVAA ON STALKING, *supra* note 7.

161. *Id.*

162. MODEL ANTI-STALKING CODE, *supra* note 3, at 37.

163. *Id.*

164. Wallace, *supra* note 117, at 28.

165. CAL. PENAL CODE § 646.9(m) (Deering 2003).

166. MODEL ANTI-STALKING CODE, *supra* note 3, at 48, 51.

167. See, e.g., McAnaney et al., *supra* note 24, at 906.

Lastly, victims can file criminal charges against their stalkers under the anti-stalking statutes.¹⁶⁸ The problem with criminal charges is that in reality, stalkers will only have to serve 50% of their sentence compared to other people in state prison, even though their obsessions last much longer.¹⁶⁹ This is because both law enforcement and some judges do not treat the crime of stalking as seriously as they should.¹⁷⁰ Since many victims are stalked by former intimate partners, the judicial system has a tendency to view “violence against women as domestic disputes to be settled in the home.”¹⁷¹ Furthermore, just as victims of acquaintance rape are often viewed as having “negligently contributed to [the] assault” by going out with the perpetrator, victims of stalkers are often viewed as “having opened themselves up to being stalked by having had a prior relationship” with their stalkers.¹⁷²

C. Existing Problems

Although victims may take all the physical and legal precautions to protect themselves from their stalkers, they remain in danger even after their stalker has been arrested. This is because the stalker is usually released prior to trial, and upon release, may be more dangerous to the victim because he is angered by the arrest.¹⁷³ Despite this obvious danger, most states will not detain the stalker prior to trial because “the right to pretrial release is guarded carefully in state constitutions and statutes.”¹⁷⁴ Only a few states require bail or have created conditions of pretrial release. For example, Ohio has a list of factors a court must consider in order to determine bail.¹⁷⁵ Arkansas, Georgia, Maryland, Texas and West Virginia only release stalkers pretrial on the condition that they make absolutely no contact with their victims.¹⁷⁶

As a compromise, some states have victim notification provisions

168. Wallace, *supra* note 117, at 28.

169. Michon A. Martin, Assistant District Attorney, Remarks at the First San Francisco Stalking Task Force Meeting (June 18, 2002) (notes on file with author).

170. *Id.*

171. Heather M. Stearns, *Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 SANTA CLARA L. REV. 1027, 1050 (1995).

172. Bradfield, *supra* note 31, at 262.

173. MODEL ANTI-STALKING CODE, *supra* note 3, at 55.

174. *Id.* at 55-56.

175. OHIO REV. CODE ANN. § 2937.23 (Anderson 2002).

176. MODEL ANTI-STALKING CODE, *supra* note 3, at 28.

in their statutes to alert the victim of when the stalker will be released. Some require that the victim be notified if the stalker is released before trial, while others require notification when the stalker is released from prison.¹⁷⁷ Although not yet implemented, some states are even considering using electronic monitoring devices as a condition of pretrial release or alternative to jail.¹⁷⁸

Despite the existence of anti-stalking statutes, such laws will fail to adequately protect victims if the police and the judicial system do not enforce them. As the Maria Teresa Macias case illustrates, the stalker's behavior will often escalate to the point of violence or near-violence if the police do not intervene and arrest the stalker early on.¹⁷⁹ Instead of treating stalking cases in which the victim had a former relationship with her stalker as a private matter, the justice system should treat every stalking victim as if she is the victim of a crime committed by a stranger. This is because the impact of stalking on victims in these situations is just as traumatizing, if not more so, because their trust in these former acquaintances has been violated.¹⁸⁰

VII. Anti-Stalking Legislation in Japan

Just as the murder of Rebecca Schaeffer was the driving force of anti-stalking legislation in the United States, it was the deaths of two women—a college student in Okegawa, Saitama Prefecture, and a high school student in Numazu, Shizuoka Prefecture—that forced Japan to recognize and deal with the increasing number of stalking crimes.¹⁸¹ Ten years after California enacted America's first anti-stalking statute, Japan instituted an anti-stalking law on November 24, 2000.¹⁸² This delay was not because stalking did not exist or was only a rare occurrence in Japan. On the contrary, according to a survey conducted by the National Police Agency (NPA) in the six months following the enactment of the anti-stalking law, the police

177. *Id.*; e.g., TEX. CRIM. PROC. CODE ANN. § 56.11 (Vernon 2002) (victim notification is required if the stalker is released, or if the stalker escapes from a correctional facility).

178. MODEL ANTI-STALKING CODE, *supra* note 3, at 36.

179. *See supra* Part I.

180. Bradfield, *supra* note 31, at 262 (analogizing victims stalked by former acquaintances to acquaintance rape).

181. *Politicians Encroaching on Bureaucrats' Turf*, YOMIURI SHIMBUN, June 8, 2000, available at 2000 WL 20280698.

182. *Focus: Stalking Victim Determined Not to Let Stalker Win*, JAPAN WEEKLY MONITOR, Nov. 26, 2001, available at 2001 WL 29458438.

received over 9,000 stalking complaints, more than half of which were in the major urban areas.¹⁸³ Of the victims, 88.8% were women, and 88.4% of the stalkers were men.¹⁸⁴ Excluding 1,663 cases where the police could not identify the relationship between the stalker and the victim, 51.2% of the cases involved current or former intimate partners, and “14.4% involved a current or former spouse.”¹⁸⁵ Similar to the statistics in the United States, in almost all the cases in Japan the victim knew her stalker.¹⁸⁶

A. *Historical Development*

Prior to the enactment of the anti-stalking legislation, stalkers were punished under the Japanese Penal Code or other laws such as blackmail or assault statutes.¹⁸⁷ Since these laws were not designed to deal with stalking, they were largely ineffective at curbing the activities of stalkers. Growing public fear over the recent rise of stalking-related murders prompted the Japanese government to create a law that specifically addressed the crime of stalking. Anti-stalking task forces within the police departments of approximately forty-seven prefectures (districts) have been created, and qualified clinical psychologists have been recruited to be a part of the task forces.¹⁸⁸ This new anti-stalking law is being called “unprecedented” by many because it allows law enforcement to crack down on stalking activities that were not previously considered as such under the Penal Code and other laws.¹⁸⁹

B. *Definition*

In Japan, stalking is defined as “repeated acts of harassment of a specific person, motivated by an emotional attachment or a grudge borne because of unrequited love.”¹⁹⁰ A person who engages in any of

183. *66 Arrested in 6 Months After Anti-Stalking Law Took Effect*, JAPAN WEEKLY MONITOR, Aug. 27, 2001, available at 2001 LEXIS 78570621.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Troubleshooter*, YOMIURI SHIMBUN, Jan. 27, 2001, available at 2001 WL 3965969.

188. *Anti-Stalking Law Takes Effect, MPD Launches Task Force*, JAPAN WEEKLY MONITOR, Nov. 27, 2000, available at 2000 LEXIS 67544046.

189. *Id.*

190. *Diet Enacts Law to Crack Down on Stalkers*, YOMIURI SHIMBUN, May 19, 2000, available at 2000 WL 20279774.

the following eight activities can be charged with stalking:

Following and waiting near or visiting the victim's home, office, school or other places the victim frequents without a previous appointment.

Placing the victim under relentless surveillance and informing the victim that he or she is being closely watched.

Demanding to meet or go out with the victim when he or she has no wish to do so.

Speaking or acting rudely toward the victim.

Making silent or constant telephone calls or sending repeated fax messages to the victim.

Sending repugnant items that will cause discomfort to the victim such as excrement or dead animals.

Telling the victim that the stalker knows secrets that could ruin the victim's reputation.

Telling the victim things that will make him or her feel sexually debased or sending documents or pictures that will sexually embarrass the victim.¹⁹¹

The penalty for anyone found guilty of violating the law is up to six months in jail or a maximum fine of ¥500,000 (approximately \$4,250 USD).¹⁹²

C. Methods of Protection

Under the new anti-stalking law, victims can ask the police to issue warnings against stalkers.¹⁹³ These simple warnings have been quite effective. Of the 453 people the police issued warnings to in the six months after the law took effect, 96% ceased their stalking activities.¹⁹⁴ If a stalker continues to persist after the initial police warning, a desist order, which is similar to a restraining order, is issued to the stalker.¹⁹⁵ Upon violation of this order, the stalker faces

191. *Id.*

192. *Id.* For currency converter, go to <www.xe.com/ucc/convert.cgi> (visited May 23, 2003).

193. *Troubleshooter*, *supra* note 187.

194. *66 Arrested in 6 Months After Anti-Stalking Law Took Effect*, *supra* note 183.

195. *Stalker Held For Ignoring Police Warning, Desist Order*, JAPAN WEEKLY MONITOR, Jan. 15, 2001, available at 2001 WL 9082457.

increased penalties ranging from a maximum of one year in jail to a ¥1 million fine.¹⁹⁶

Although it developed later in time, the Japanese anti-stalking law is much more pro-active and victim-oriented than any of the anti-stalking laws that exist in the United States today. While not

Stalking insurance allows Japanese victims to be compensated for injuries, without having to deal directly with their stalkers.

mandated to do so, the Japanese police lend portable security buzzers and telephone answering machines to victims.¹⁹⁷

Furthermore, they give victims technical advice on how to block cellular phone calls and e-mails.¹⁹⁸

At the request of the victim, the police will also give the victim their stalker's address,¹⁹⁹

presumably so that the victim can take affirmative steps to avoid the stalker or move far away from the stalker.

Not conventional by any means, an alternative form of compensation in Japan is stalking insurance. Such insurance policies are important because victims can be compensated for physical injuries sustained in a stalker-related attack without having to deal directly with their stalkers.²⁰⁰ Two insurance companies in Japan currently offer stalking insurance to victims. Sumitomo Marine & Fire Insurance Company sells non-life insurance that covers victims against injuries caused intentionally by their stalkers.²⁰¹ Under the policy, if victims sustain facial injuries in attacks by their stalkers, they can receive four times the insurance money.²⁰² If they are victims of hit-and-run accidents, they receive twice as much, and if they are

196. *Id.*

197. 20 Held, 86 Warned in 1st Month of Anti-stalking Law, JAPAN WEEKLY MONITOR, Jan. 1, 2001, available at 2001 WL 9082104. As of January 1, 2001, of the 103 women and 6 men stalked, the police lent out security buzzers and answering machines in 24 cases, and advised victims on how to block harassing phone calls and e-mails in 19 cases.

198. *Id.*

199. *Anti-Stalking Law Takes Effect, MPD Launches Task Force*, *supra* note 188.

200. If victims were to sue their stalker directly for civil damages, they would have to interact with their stalkers in court, which is exactly what erotomania and love obsession stalkers want.

201. *Sumitomo to Sell Insurance For Women Against Stalkers*, JAPAN WEEKLY MONITOR, May 29, 2000, available at 2000 WL 23402925.

202. *Id.*

beaten by their spouses, they receive the same amount conditionally.²⁰³

Sumitomo sells three and five year insurance policies where victims can choose between monthly insurance premiums of ¥3,000 or ¥4,000 (approximately \$25 or \$34).²⁰⁴ Victims who choose the three year policy are paid ¥3,000 per day for hospitalization costs when they sustain non-self-inflicted injuries.²⁰⁵ This amount is increased to ¥6,000 per day if their stalkers injure them.²⁰⁶ When stalkers injure the policyholder's face, they receive ¥12,000 per day for hospitalization costs.²⁰⁷ When the insurance contract ends, victims are paid ¥54,000, about half of the total insurance premiums paid.²⁰⁸

Tokio Marine & Fire Insurance Company offers similar insurance coverage.²⁰⁹ One big difference, however, is that the company works in conjunction with a major security service provider, Sogo Keibi Hosho Company.²¹⁰ Sogo Keibi provides women insured with Tokio Marine with advice, and helps them gather evidence they can use to prosecute their stalker under the anti-stalking law.²¹¹ For example, Sogo Keibi will remove wiretaps if the victims' homes are bugged.²¹² Tokio Marine charges a maximum premium of ¥4,500 a month, and ¥5,000 whenever the policyholders use Sogo Keibi's services.²¹³ If the policyholders are actually attacked by their stalkers, Tokio Marine will cover up to ¥200,000 in costs.²¹⁴

D. Existing Problems

^f Although Japan's newly implemented anti-stalking law has largely been effective in curbing the behavior of stalkers, some victims are not satisfied. Of twenty-five people polled, approximately 40% of the victims said they were dissatisfied with the response of the

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Tokio Marine to Offer Stalking Insurance*, JAPAN WEEKLY MONITOR, Dec. 18, 2000, available at 2000 WL 30240436.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

police who handled their cases.²¹⁵ They claimed that the police do not provide protection if they are merely harassed, and that investigators are “reluctant to do their job.”²¹⁶ Other victims complained that the police do not even listen to their claims.²¹⁷ Many of these victims want harsher punishments and “a government-backed system to compensate those who suffer psychological effects from stalking, as well as a third-party body to provide consolation and support other than the police.”²¹⁸

While the majority of the victims in Japan feel that the new anti-stalking law is effective in stopping the behavior of their stalkers, both victims and investigators seem to agree that the investigators need to work on their “skill and delicacy in talking with victims and their families.”²¹⁹ This is because there is a general attitude of mistrust when it comes to the police because of how they handled stalking-related crimes and deaths in the past.²²⁰ Although police complain that many victims are not honest with them about their relationship with their stalkers, they concede that they do not have “special knowledge about stalking and lack understanding of the victims’ feelings.”²²¹

VIII. Recommendations for Improving Anti-Stalking Laws in the United States

Stalking is a unique crime because it does not involve immediate violence. Rather, the stalker will engage in a series of acts that eventually escalates into violence. Consequently, creating an effective legal response to the problem of stalking requires three important components: (1) creating constitutionally valid statutes; (2) police education and training; and (3) prevention and early intervention.

A. Constitutionally Valid Statutes

Anti-stalking legislation serves a compelling government interest because it functions to stop stalkers *before* they carry out their threats

215. *40% of Stalking Victims Dissatisfied With Police: Survey*, JAPAN WEEKLY MONITOR, May 28, 2001, available at 2001 WL 22307596.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Anti-Stalking Law Takes Effect, MPD Launches Task Force*, *supra* note 188.

220. *Id.*

221. *40% of Stalking Victims Dissatisfied With Police: Survey*, *supra* note 215.

of violence. However, some state anti-stalking statutes are better constructed than others, making them less vulnerable to a constitutional attack. California, for example, chose to construct its statute narrowly, defining stalking as the willful, malicious and repeated following or harassing of a person, plus a credible threat with the intent to place that person in reasonable fear of death or bodily injury.²²² Requiring intent is important to survive an overbreadth challenge because it eliminates from proscription any innocent protected conduct.²²³ Thus, certain constitutionally protected conduct such as peaceful labor picketing would not be proscribable because there is no intent to commit the crime of stalking as defined.²²⁴ Furthermore, California defines relevant terminology such as “harasses,” “course of conduct” and “credible threat,” thereby giving both the stalker and the police adequate notice of what conduct is prohibited.²²⁵

Statutes like those in Florida, however, face possible constitutional challenges because they are constructed too broadly. In Florida, an individual can be convicted of a misdemeanor of the first degree if he “willfully, maliciously, and repeatedly follows or harasses another person”²²⁶ This is problematic because a person could be punished for his mere presence since no threat or harm is required.²²⁷ Thus, an investigative reporter merely following the subject of his story more than once could possibly be convicted of stalking under this statute.²²⁸ Another problem with Florida’s statute (as well as California’s statute) is that while it defines “harass,” it does not define “follows.”²²⁹ As one commentator noted, “What then constitutes following? How far must one ‘follow’ to break the law? . . . Could trailing behind a person for a few blocks to get a better view because she looked familiar constitute stalking?”²³⁰ By not requiring law enforcement to analyze the stalker’s intent, Florida’s statute leaves room for arbitrary and discriminatory

222. CAL. PENAL CODE § 646.9 (Deering 2003).

223. Suzanne L. Karbarz, Note, *The First Amendment Implications of Antistalking Statutes*, 21 J. LEGIS. 333, 345-46 (1995).

224. *Id.*; CAL. PENAL CODE § 646.9(f), (i).

225. CAL. PENAL CODE § 646.9.

226. FLA. STAT. § 784.048 (2002).

227. Walker, *supra* note 37, at 293.

228. *Id.*

229. *Id.*; FLA. STAT. § 784.048 (2002); CAL. PENAL CODE § 646.9.

230. Walker, *supra* note 37, at 293.

enforcement, because it forces the police to rely on the perception and word of the person being stalked.²³¹

Although states are not required to follow the Model Anti-Stalking Code created by the NIJ, each state should make affirmative efforts to protect the victims without violating the rights of the alleged stalker. Stalking victims who are not explicitly threatened would be better protected by statutes incorporating the threat *or* conduct requirement. To minimize the possibility of false accusations, statutes should have language that analyzes both the stalker's intent and the perceptions of the person making the allegation. In order to avoid any overbreadth challenges, statutes need to specifically state what constitutionally protected conduct, such as organized protests and labor picketing, are not proscribed. Similarly, to avoid vagueness challenges, states may want to list and define exactly what conduct constitutes stalking in the same way that Colorado defines harassment.²³² This would put the stalker on notice of what conduct is not legal and eliminate any guesswork on the part of the police.

B. Police Education and Training

A well-constructed anti-stalking statute is only valuable to a stalking victim if it is effectively enforced. Unlike investigating crimes that have already occurred, the police are "neither trained nor provided the necessary resources to gather and evaluate non-criminal justice, behavioral, social, or psychological information about an individual for use in assessing that individual's potential for violence."²³³ Law enforcement officers must be educated on the crime of stalking. As suggested by the Model Anti-Stalking Code, the police need guidance and training in four main areas: (1) the provisions and evidentiary requirements of stalking laws; (2) identifying and monitoring stalking incidents; (3) assessing the potential dangerousness of suspected stalkers; and (4) assisting

231. *Id.*

232. In Colorado, a person commits harassment if, with intent to harass, annoy, or alarm another person, he: "(a) Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact; or (b) In a public place directs obscene language or makes an obscene gesture to or at another person; or (c) Follows a person in or about a public place; or . . . (f) Makes a telephone call or causes a telephone to ring repeatedly, whether or not a conversation ensues, with no purpose of legitimate conversation" For the complete definition of harassment, see COLO. REV. STAT. § 18-9-111 (2002).

233. MODEL ANTI-STALKING CODE, *supra* note 3, at 74.

stalking victims.²³⁴ They must familiarize themselves with their state's anti-stalking statutes so that they will be able to recognize stalking behavior and know when to intervene before the behavior escalates to violence. Although the victim may have intimately known the stalker, law enforcement should not dismiss the situation as a domestic dispute. Rather, law enforcement should have procedures in place for recognizing and handling stalking cases. Specifically, police officers should be trained not only to recognize stalking behavior, but also to assess a stalker's threats and develop a course of intervention with the victim's safety as the main goal.

Currently, a few states have police training programs in place to combat the stalking problem. California recently asked its Commission on Peace Officer Standards and Training to:

implement by January 1, 2002, a course or courses of instruction for the training of law enforcement officers in California in the handling of stalking complaints and . . . develop guidelines for law enforcement response to stalking. The course or courses of instruction and the guidelines shall stress enforcement of criminal laws in stalking situations, availability of civil remedies and community resources, and protection of the victim. Where appropriate, the training presenters shall include stalking experts with expertise in the delivery of direct services to victims of stalking.²³⁵

The only problem with this statute is that participation in the course or courses is voluntary.²³⁶

In Nevada, each officer is required to be trained in dealing with the crimes of stalking and aggravated stalking *as a condition of certification*.²³⁷ With almost 1.4 million people stalked each year,²³⁸ police training on stalking should be mandatory in all states.

C. Prevention and Early Intervention

In addition to having law enforcement officers intervene early on, by either warning the stalker that his conduct is unwanted or by arresting the stalker, the judicial system should also take steps to stop stalking behavior from escalating into violence. Many states still

234. *Id.*

235. CAL. PENAL CODE § 13519.05 (Deering 2003).

236. CAL. PENAL CODE § 13519.05(d).

237. NEV. REV. STAT. § 289.600 (2002).

238. DOJ REPORT, *supra* note 4, at 6.

engage in the disturbing trend of prosecuting stalking cases as violations of protective orders instead of violations of the state's anti-stalking statute. To deter potential stalkers and protect the victim, every state should classify stalking as a felony, even for a first offense. Rather than treating stalking as a misdemeanor, punishable by up to one year in prison, anti-stalking statutes should impose stiffer penalties and longer periods of incarceration. Classification of stalking as a felony uniformly among the states would not only prevent stalkers from moving to other states where stalking is only considered a misdemeanor, it would send the message that the judicial system is treating stalking as a unique and serious crime. Only less serious cases, such as those involving only a few harassing phone calls, should be prosecuted as violations of protective orders.

Also, since stalkers tend to be even more dangerous after arrest, they should not be released prior to trial. As research conducted by the NIJ indicates, many stalkers suffer from mental disorders, so setting bail or pretrial release limitations, such as prohibiting the stalker from contacting the victim, do not adequately protect the victim. In fact, many stalkers are so angered and aggravated by their arrest that they are more likely to lash out violently against their victim. For stalkers with mental disorders, states should implement mandatory electronic monitoring of the stalker if he is released before trial to make sure that the stalker does not come near the victim.

There may be constitutional challenges to restricting a stalker's movements by arresting the stalker or disallowing the stalker from following or being in the vicinity of the victim. Although the freedom to travel throughout the United States is recognized as a basic right protected by the U.S. Constitution,²³⁹ as long as states have a compelling reason to restrict the right of an individual to travel, and construct their anti-stalking statutes narrowly to protect citizens from malicious or willful conduct, such statutes will probably not be deemed impermissibly restrictive. As to warrantless arrests of stalkers, critics have argued that they violate the Fourth Amendment because innocent people could be subjected to false arrest merely based upon an alleged victim's word.²⁴⁰ Such a constitutional violation can be avoided as long as police officers have probable cause to make

239. *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901 (1986).

240. Walker, *supra* note 37, at 298 (citing *Nightline: Anti-Stalking Laws*, (ABC television broadcast, Sept. 3, 1992)).

the arrest.²⁴¹

D. Japan as a Model

In creating a better remedy for stalking victims, the United States should incorporate some of Japan's anti-stalking measures. The United States should first create special anti-stalking task forces within the police departments and recruit qualified clinical psychologists to be a part of the task forces. Having psychologists on the task forces would be extremely beneficial because they are probably the most qualified to assess whether or not an individual is a potential threat. Second, instead of merely advising victims to obtain restraining orders, the police should personally issue warnings to the stalkers. In Japan, these warnings have been very effective in curbing the activities of stalkers because it sends the message, *from the very beginning*, that stalking is a serious crime that will not be tolerated. Furthermore, the police should show victims how to protect themselves by lending out portable security buzzers and giving victims technical advice on how to block harassing phone calls and e-mails. The anti-stalking task force should also help victims gather evidence they can use to effectively prosecute their stalker.

Aside from better law enforcement, the U.S. government should also allow and encourage insurance companies to offer stalking insurance to victims at affordable rates. The sad fact is that the majority of stalking cases result in some form of injury to the victim. Whether the injury is purely emotional or whether it is physical, insurance created especially for stalking victims will give them the peace of mind that if, in the unfortunate event they are attacked by their stalker, all their medical expenses will be taken care of. Moreover, stalking insurance will fill the void created by insurance companies that do not provide for emotional distress.

Conclusion

In order to provide victims with maximum protection under the legal system, anti-stalking statutes must be carefully drafted to encompass the numerous ways stalkers terrorize their victims without proscribing constitutionally protected conduct. While an effective

241. Probable cause exists where "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925).

anti-stalking statute is an important first step, victims will be left unprotected without proper police training and intervention by the justice system from the beginning. Prosecutors and law enforcement officials must recognize that stalking is a unique and serious crime that should not be prosecuted under domestic violence or harassment statutes. Anti-stalking statutes are better designed to put an end to stalking behavior than civil protective orders; all stalking cases should be handled under anti-stalking statutes.

Although Japan implemented its anti-stalking law almost a decade after California first acted in 1990, it is far more progressive than any of the anti-stalking statutes that currently exist in the United States today. To better protect stalking victims, the United States should incorporate Japan's victim-oriented measures and make sure that the criminal justice system takes a proactive stance in enforcing the anti-stalking statutes.

